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Case No. .....

In the Supreme Court of the United States

October Term, 1982

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

and

OFFICE OF CONSUMERS' COUNSEL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. May the State of Ohio, by statute, constitutionally require a public utility to invest its capital for the convenience of the public to provide adequate service in the future and simultaneously prohibit, by statute, that utility from recovering through rates such capital when prudently invested?

2. May the State of Ohio, by statute, constitutionally prohibit a public utility from recovering through rates its capital, prudently invested for the convenience of the public, where the undisputed facts show that the utility, and its investors, have never been compensated through the authorized rate of return for the risk of exclusion of such costs from rates?

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ADDITIONAL AUTHORITIES CITED TO THE OHIO SUPREME COURT

The following authorities were provided to the Ohio Court to show that the overwhelming weight of modern authority supports amortization, as noted in footnote 19 at page 27, *infra:*

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FLORIDA: *Gulf Power Co. v. Cresse*, 410 So.2d 492 (Florida S.Ct, 1/28/82), affirming *Gulf Power Co.*, Docket No. 800001-EU(CR) (Fla. Pub. Serv. Comm., 11/10/80);

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MICHIGAN: *Consumer Pwr. Co.*, Case No. F-700 (Mich. Pub. Serv. Comm., 2/10/75); *Detroit Ed. Co.*, Case No. F-762 (Mich. Pub. Serv. Comm., 7/26/76); *Detroit Ed. Co.*, Case No. U-5108 (Mich. Pub. Serv. Comm., 5/27/77);

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NEW JERSEY: *Pub. Serv. Elec. and Gas Co.*, Dkt. No. 794-310 OAL Dkt. No. PUC 877-79, 37 P.U.R. 4th 631 (N.J. Dept. of Egy., Bd. of Pub. Util., 4/11/80); *Hope Creek Investigation*, Docket No. 8012-914 (N.J. Dept. of Egy., Bd. of Pub. Util., 4/1/82), CCH Utilities Law Reports-State, ¶ 23,634;

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NORTH CAROLINA: *Carolina Pwr. & Lgt. Co.*, Dkt. No. E-2, Sub. 366 (N.C. Util. Comm., 4/22/80);

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WISCONSIN: *Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm.*, Case No. 79CV809 (Wisc. Cir. Ct. II, 10/15/79), *rev'd*, Ct. of App. Dist. III, Case No. 79-1929, 10/7/80); *Wisconsin Electric Power Co.*, Case No. 05-CE-3, 40 P.U.R. 4th 630, 688 (Wisc. Pub. Serv. Comm., 2/14/80)

The following authorities were cited to the Ohio Court to show that the overwhelming weight of prior authority supports amortization:

CALIFORNIA: *Calif. Farm Bureau Fed. v. San Joaquin Lt. & Pwr. Corp.*, P.U.R. 1932D, 310, 326 (Calif. R.R. Comm., 1932); *San Diego Transit Sys.*, 88 P.U.R. (n.s.) 459, 468 (Cal. Pub. Util. Comm., 1951);

DISTRICT OF COLUMBIA: *Washington Gas Light Co.*, 83 P.U.R. (n.s.) 4, at 19 (D.C. Pub. Util. Comm., 1949, referring explicitly to Account 506, Property Losses Chargeable to Operations), *aff'd in part and rev'd and remanded in part*, 188 F.2d 11 (D.C. Cir., 1950), *cert. den.* 340 U.S. 952 (1951);

FLORIDA: *Jacksonville Gas Corp.*, 40 P.U.R. 3d 372, 374-75 (Fla. R.R. and Pub. Util. Comm., 1961);

GEORGIA: *Walker County Tel. Co.*, 86 P.U.R. (n.s.) 61, 62-63 (Ga. Pub. Serv. Comm'n., 1950);

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MISSOURI: *Bolivar Tel. Co.*, 43 P.U.R. 3d 417, 419-20 (Mo. Pub. Serv. Comm'n., relying explicitly on the applicable Uniform System of Accounts, 1962); *St. Joseph Ry. Lt. Ht. & Pwr. Co.*, 5 P.U.R. (n.s.) 253 (Mo. Pub. Serv. Comm., 1934);

MONTANA: *Pub. Serv. Comm. v. Great Northern Util. Co.*, P.U.R. 1929B, 176 (Mont. Pub. Serv. Comm., 1929);

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NEVADA: *Henderson Tel. Co.*, 41 P.U.R. 3d 248, 253 (Nev. Pub. Serv. Comm'n., 1961);

NEW YORK: *Consolidated Edison Co.*, 56 P.U.R. 3d 377, 3-71-75 (N.Y. Pub. Serv. Comm., 1964);

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REPORTS OF OPINIONS BELOW

The decision of the Ohio Supreme Court dated July 7, 1982 dismissing this case without explanation is not officially reported. The Court's denial, again without explanation, of Appellant's Motion For Rehearing, dated July 29, 1982, is also not officially reported. The *Opinion and Order* of the Public Utilities Commission of Ohio in Case No. 81-1096-EL-COI dated October 21, 1981 is not officially reported. The Commission's Entry on Rehearing from that decision dated December 9, 1981 is not officially reported.

The related decision of the Ohio Supreme Court dated July 15, 1981 in *Consumers' Counsel v. Pub. Util. Comm.* (*CEI*), is reported at 67 Ohio St. 2d 153, 423 NE. 2d 820 (1981).[1] The Court's denial of Appellant's Motion For Rehearing from that decision is not officially reported. The Court's denial of Appellant's Motion For Stay is not officially reported. The related *Opinion and Order* of the Public Utilities Commission of Ohio in Case No. 79-537-EL-AIR dated July 10, 1980 is reported at 38 PUR 4th 494 (1980). The Commission's Rehearing Entry dated September 3, 1980 in that case is not officially reported. A copy of each of these decisions is included in the separate Appendix.

GROUNDS FOR JURISDICTION

This appeal is brought to review a decision of the Ohio Supreme Court dismissing Appellant's appeal from an *Opinion and Order* of the Public Utilities Commission of Ohio reducing Appellant's rates for electric utility service to retail customers in Ohio.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) to review the final judgment rendered on July 7, 1982 by the Ohio Supreme Court, the highest court of the State of Ohio. Appellant's Motion for Rehearing was denied by the Ohio Supreme Court on July 29,

[1]Hereinafter cited as *Consumers' Counsel.*

1982. Appellant filed its Notice of Appeal with the Ohio Supreme Court on October 15, 1982.

The validity of Ohio Revised Code Sections 4905.22 and 4909.15(A)(4) was drawn into question before the Ohio Supreme Court on the grounds that, as construed and applied, they are repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States, and the decision of the Ohio Supreme Court was in favor of the validity of those statutes.

In the event that an appeal is not considered the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. The Fifth Amendment to the Constitution states, in pertinent part, as follows:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment to the Constitution states, in pertinent part, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

3. Ohio Revised Code § 4905.22, states, in pertinent part, as follows:

> "Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities as are adequate and in all respects just and reasonable."

4. Ohio Revised Code § 4909.15, states, in pertinent part, as follows:

> "(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, and charges shall determine:
>
> • • •
>
> (4) The cost to the utility of rendering the public utility service for the test period. . . ."

5. Ohio Administrative Code § 4901:1-9-05, Uniform Classification of Accounts for Electric Utilities – FPC, 1961 states, in pertinent part:

> "The system of accounts and records, identified and designated as "Uniform System of Accounts Prescribed for Public Utilities and Licenses, effective January 1, 1961," as adopted by the Federal Power Commission, is adopted by this Commission effective as of January 1, 1961, for electric light companies operating within the state of Ohio which are subject to the jurisdiction of the Federal Power Commission. . . . Each such public utility shall carry on its books, in addition to such additional accounts as may hereafter be prescribed by this Commission, the accounts and records prescribed in said Uniform System of Accounts effective January 1, 1961, for a public utility of its class, and shall accordingly keep such accounts in accordance with the requirements, definitions and instructions contained and set forth in said uniform system of accounts. . . ."

6. FERC Uniform System of Accounts, 18 C.F.R. 101, Definitions, p. 288 states, in pertinent part:

> "8. "Cost" means the amount of money actually paid for property or services. . . ."

7. FERC Uniform System of Accounts, 18 C.F.R. 101, Electric Plant Instructions, ¶ 4, Overhead Construction Costs, p. 300 states, in pertinent part:

"A. All overhead construction costs, such as engineering, . . . construction engineering and supervision by others than the accounting utility, law expenses, insurance, injuries and damages, relief and pensions, taxes and interest, shall be charged to particular jobs or units. . . ."

8. FERC Uniform System of Accounts, 18 C.F.R. 101, Balance Sheet Chart of Accounts, Assets and Other Debits, Account 107, Construction Work In Progress — Electric, p. 313 states, in pertinent part:

"A. This account shall include the total of the balances of work orders for electric plant in process of construction.

B. . . . Any expenditures which are identified exclusively with units of property not yet in service shall be included in this account."

9. FERC Uniform System of Accounts, 18 C.F.R. 101, Balance Sheet Chart of Accounts, Assets and Other Debits, Account 182, Extraordinary Property Losses, p. 324 states:

"A. When authorized or directed by the Commission, this account shall include extraordinary losses on property abandoned or otherwise retired from service which are not provided for by the accumulated provisions for depreciation or amortization and which could not reasonably have been foreseen and provided for, and extraordinary losses, such as unforeseen damages to property, which could not reasonably have been anticipated and which are not covered by insurance or other provisions."

STATEMENT OF THE CASE

A. The facts material to the questions presented.

The underlying facts are known to the Court and are set out in detail in the Ohio Supreme Court's Opinion in *Consumers' Counsel* as well as in the decisions of the

Public Utilities Commission of Ohio ("Commission") in PUCO Case Nos. 79-537-EL-AIR and 81-1096-EL-COI and the briefs of the parties in the prior appeal to this Court (Case No. 81-1002). They need, therefore, be only briefly reviewed here in order to put the legal issues in context.

Appellant, The Cleveland Electric Illuminating Company ("CEI") is an electric utility rendering service in northeastern Ohio. It is regulated in various respects by the Public Utilities Commission of Ohio and is obligated, by Ohio Revised Code Section 4905.22 to furnish necessary and adequate facilities for the reliable rendition of service in its territory to all who seek it, both now and in the future.

In 1967, The Cleveland Electric Illuminating Company joined with four other electric utilities (Ohio Edison, Toledo Edison, Duquesne Light and Pennsylvania Power) in an organization, the Central Area Power Coordination Group ("CAPCO"), for the joint planning, construction and operation of "base load" generation capacity; i.e., very large generating units intended to be less expensive to operate at a relatively constant level of production. Such units require extremely long construction lead times and, therefore, must be planned and committed many years in advance.

In early 1973, the CAPCO companies, acting on the best forecasts and information available, entered into commitments to construct four nuclear units — Davis-Besse Units №2 and №3 and Erie Units №1 and №2 — in order to supply the required adequate amount of electric power to the public in 1983 and thereafter. The Commission found that this decision was prudent.

Pursuant to that decision, CEI (with its CAPCO partners) began expending its capital to plan, engineer and begin initial construction of the four units. Subsequent

developments, not the least of which was the Arab Oil Embargo (which no one could have predicted) resulted in a reduction of the forecasted rate of growth in the demand for power in the CAPCO area. The Commission found that CEI's decisions to continue planning and engineering expenditures were prudent.

Yet another unanticipated factor was added in early 1979, when the Three-Mile Island ("TMI") incident resulted in sharply increased political and regulatory uncertainty regarding the construction and operation of nuclear generating plants. The TMI unit was constructed by Babcock and Wilcox, the same company which had already constructed a licensed and operating nuclear generation unit known as Davis-Besse Unit #1 for some of the CAPCO companies, including CEI. Before TMI, it had been anticipated that Davis-Besse Unit #1 would be duplicated in constructing the other four planned units, with attendant savings.

However, after TMI, it became apparent that the substantial savings of time and money anticipated by CAPCO from duplicating the existing Davis-Besse Unit #1 when Davis-Besse #2 and #3 and Erie #1 and #2 were constructed would not occur. Davis-Besse #2 and #3 and Erie #1 and #2 were exposed to drastic design change requirements and to unpredictable future licensing, design, construction, and operation requirements by the Nuclear Regulatory Commission.

These considerations caused CEI and its CAPCO partners to terminate planning for the four units on January 23, 1980[3]. At that time, CEI had dedicated $56,437,000.00

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[3]The cancellation of these units did not result in a complete cessation of the CAPCO construction program. There are other base load generating units still under construction.

toward planning, engineering and initial construction costs on those units.[4] The Commission found that the decision to terminate was prudent.

On June 19, 1979, Appellant had served and filed a Notice of Intent to submit a rate increase application to the Commission, which had assigned to that Notice Case Number 79-537-EL-AIR (the "1979 Case").[5] After regular investigation by the Commission's Staff, hearings began on April 12, 1980 and lasted 32 trial days.

On July 10, 1980, the Commission issued its *Opinion and Order* in Case No. 79-537-EL-AIR granting CEI an increase in rates. The Commission accepted the recommendation of its Staff and authorized as a part of allowable costs for rate-making purposes the amortization[6] of the costs for planning, engineering, and initial construction associated with the four nuclear generating units which had been cancelled and abandoned on January 23, 1980.

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[4]The other utilities belonging to CAPCO had also dedicated substantial amounts to planning the four cancelled plants. Ohio Edison had dedicated approximately $85.5 million. Toledo Edison had dedicated approximately $24.5 million. Duquesne Light had dedicated approximately $35 million. Pennsylvania Power had dedicated approximately $16 million.

[5]A chart setting out the relevant dates of all Appellant's electric rate cases before the Ohio Commission and the Ohio Court, from Case No. 79-537-EL-AIR to the present, is attached hereto as Exhibit I for the Court's convenience.

[6]The Uniform System of Accounts, Definitions: "4. "Amortization" means the gradual extinguishment of an amount in an account by distributing such amount over a fixed period, over the life of the asset or liability to which it applies, or even the period during which it is anticipated the benefit will be realized." The Uniform System of Accounts is discussed *infra*.

The Commission allowed amortization of $56,437,000.00 in expenses over ten years.[7]

The Ohio Office of Consumers' Counsel ("OCC") and other intervenors in the Commission proceeding appealed the Commission's decision to the Ohio Supreme Court (Cases Nos. 80-1480, 80-1528, and 80-1547). CEI participated in that appeal as Intervening Appellee. On July 15, 1981, the Ohio Court, in a 5-2 decision, reversed and remanded the July 10, 1980 *Opinion and Order* of the Commission, holding that even where, as here, a capital expenditure for planning future utility service was required by Ohio Revised Code § 4905.22 for the convenience of the public and was prudent, the Commission nevertheless had no discretion to allow "the return *of* capital invested in failed projects" (67 Ohio St.2d at 167) as a "cost" under Ohio Revised Code § 4909.15(A)(4), as then construed for the first time by that Court. *Consumers' Counsel v. Pub. Util. Comm. (CEI)*, 67 Ohio St.2d 153, 423 N.E. 2d 820 (1981).

The Ohio Court has recently held that in *Consumers' Counsel* it announced "new law." *Consumers' Counsel v. Pub. Util. Comm. (Toledo Edison)*, 1 Ohio St.3d 22, at 24, 437 N.E.2d 586 (1982).

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[7]In effect, CEI was authorized to restore the investment to the investor over a ten year period, similar to the recovery of the investment which would have been achieved through depreciation over the life of the plants if they had gone into service. *See* Ohio Revised Code § 4905.18, which expressly provides for recovery of depreciation expense by the investor.

On July 24, 1981, CEI filed its Motion for Rehearing with the Ohio Court.[8] On September 1, 1981, that Court denied the Motion for Rehearing with a standard form Entry. On September 2, 1981, CEI filed with the Ohio Court its Notice of Appeal to this Court and a Motion for Stay. The Ohio Court denied the Motion for Stay with a standard form Entry on September 11, 1981.

By the time of the Ohio Court's decision in *Consumers' Counsel* reversing and remanding PUCO Case No. 79-537-EL-AIR to the Commission to eliminate the expenses involved, the Commission had already issued its *Opinion and Order* in CEI's subsequent rate case, PUCO Case No. 80-376-EL-AIR (the "1980 Case"), so the rates in effect at the time of the *Consumers' Counsel* decision had been established pursuant to the 1980 case. In establishing the 1980 Case, the Commission had again included as an allowable expense the amortization of the four cancelled units. Although OCC was a party to the 1980 case, and although the case was appealed to the Ohio Court on other issues, *see Senior Citizens Coalition v. Pub. Util. Comm.*, 69 Ohio St.2d 625, 433 N.E.2d 583 (1982), *no* party appealed the Commission's decision allowing the amortized amount of the cancelled units as an allowable expense.

Faced with the Ohio Court's remand in *Consumers' Counsel*, the Commission then instituted on September 16, 1981, on its own motion, PUCO Case No. 81-1096-EL-

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[8]Amortization of Ohio Edison's cancellation costs had been allowed in *Ohio Edison Co.*, PUCO Case No. 80-141-EL-AIR (*Opinion and Order*, April 9, 1981). Within days of the Ohio Court's July 15, 1981 decision in *Consumers' Counsel*, and as a direct result of its holding, the Commission granted to Ohio Edison, with the express consent of OCC, emergency rate relief in the annualized amount of $90,000,000, to offset the financial consequences resulting to that member of CAPCO. *Ohio Edison Co.*, PUCO Case No. 81-989-EL-AEM (*Opinion and Order*, July 31, 1981).

COI.[9] On September 22, 1981, CEI filed with this Court its Application For Stay of Execution And Enforcement of the Judgement of the Ohio Court. (Case No. A-250). This Court denied the requested Stay on October 12, 1981.

By its *Opinion and Order* dated October 21, 1981 ("the COI Order"), the Commission reduced CEI's rates for electric service by the amount which it had included in those rates in Case No. 80-376-EL-AIR with respect to the cancelled units, without any consideration of CEI's then-current revenues, expenses, or rate of return. Appellant CEI then appealed to the Ohio Court, arguing, among other things, that the Commission's COI Order reducing its rates was an unconstitutional confiscation of its property, while simultaneously briefing its appeal to this Court from *Consumers' Counsel*. Presented with the representation by OCC that the constitutional issue had *not* been decided by the Ohio Court, this Court dismissed Appellant's appeal "for want of a properly presented federal question" on January 25, 1982. *The Cleveland Electric Illuminating Company v. Office of Consumers' Counsel, et al.*, United States Supreme Court Case No. 81-1002, (February 25, 1982).

Only then did OCC move to intervene in CEI's appeal to the Ohio Court from the Commission's COI Order and move to dismiss, on the ground, *inter alia*, that the Ohio Court had *already* decided the constitutional issue.[10] The Ohio Supreme Court then dismissed with a standard form Entry on July 7, 1982. Appellant's Motion for Rehearing was similarly denied without opinion on July 29, 1982. Appellant CEI now appeals to this Court from the Ohio Court's July 7, 1982 dismissal.

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[9]"COI", in the Commission's case number abbreviations, stands for "Commission Ordered Investigation."

[10]OCC moved to intervene on April 28, 1982 and moved to dismiss on May 5, 1982.

Appellant has had yet another rate case, PUCO Case No. 81-146-EL-AIR (the "1981 Case"), which was decided by the Commission on March 17, 1982. In that case, the Commission refused to allow amortization of the cancelled units as an expense, *solely* because of the Ohio Court's decision in *Consumers' Counsel:*

> "Applicant has requested an allowance for ratemaking purposes for the amortization of the costs incurred with respect to four canceled nuclear units. This subject was fully discussed in *Cleveland Electric Illuminating Company,* Case No. 79-537-EL-AIR, Opinion and Order, July 10, 1980, in which the Commission approved such an amortization. The Commission approved the same amortization in applicant's subsequent rate case, *Cleveland Electric Illuminating Company,* Case No. 80-376-EL-AIR, *supra,* and approved a similar amortization in *Ohio Edison,* Case No. 80-141-EL-AIR, Opinion and Order, [February 11, 1981]. The Commission would approve the amortization again if it were not constrained by the decision of the Supreme Court of Ohio in *OCC v. Public Utilities Commission,* 67 Ohio St. 2d 153 (1981). This case clearly holds that this expense is, as a matter of law in Ohio, not includable as an operating expense for ratemaking purposes. The Commission must, therefore, deny applicant's request."

The 1981 Case is presently pending before the Ohio Court on CEI's appeal from the Commission's denial of the amortization as quoted above, and OCC has again intervened.

B. The stage at which the question sought to be reviewed was raised below.

CEI alerted the Ohio Court in its first brief (as an intervening appellee) in *Consumers' Counsel* of the then hypothetical constitutional problem which might arise if the Ohio ratemaking scheme were construed to prohibit recovery, as an expense, of required capital expenditures

found to be prudent. CEI cited and quoted the dissenting opinion of Commissioner Shannon in *Re: Virginia Electric & Power Company*, 29 PUR 4th 65(1979), where the Virginia Commission had allowed only amortization of the cancellation expenses:

> "Perhaps a more succinct way to state the proposition would be as follows: The investor is *constitutionally* entitled to *just compensation* for prudent expenditures. The ratemaking mechanism must provide for a return *on* the investment and the return *of* the investment. Because depreciation rates are not calculated to include the probabilities of extraordinary property losses, it is necessary to amortize the loss of Surry Units 3 and 4. Further, because rates of return have not compensated the investor for the risk of this extraordinary property loss, the unamortized balance should be included in the Company's rate base until the loss is completely amortized." (29 PUR 4th at 96, emphasis added).

CEI was, therefore, surprised by the Ohio Court's novel and unprecedented opinion – which the Ohio Court has itself described as announcing "new law"[11] – construing the word "cost" in Ohio Revised Code § 4909.15(A)(4) to prohibit the Commission from allowing even the recovery *of* (much less earnings *on*) necessary and prudent planning costs required by Ohio Revised Code § 4905.22. CEI explicity attached the validity under the Fifth and Fourteenth Amendments of those particular statutes, construed by the Ohio Court in *Consumers' Counsel*, at its earliest opportunity *after* this unconstitutional declaration of "new law" was rendered, in its Motion for Rehearing[12]

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[11] *See Consumers' Counsel v. Pub. Util. Comm. (Toledo Edison)*, 1 Ohio St.3d 22, at 24, 437 N.E.2d 586 (July 14, 1982).

[12] A copy of CEI's Motion for Rehearing has previously been supplied to this Court as Exhibit 3 to CEI's Application For Stay. (Case No. A-250).

to the Ohio Court filed on July 24, 1981. The Ohio Court appeared to decide in favor of the constitutionality of Ohio Revised Code § 4905.22 and § 4909.15(A)(4) when it decided against Appellant's Motion for Rehearing on September 1, 1981.

On CEI's appeal to this Court, this Court dismissed "for want of a properly presented federal question."

CEI clearly presented this federal question of the constitutionality of the Ohio statutes, as construed, in its appeal to the Ohio Court from the Commission's COI Order reducing CEI's rates. The Ohio Court dismissed that appeal without opinion. In CEI's Motion for Rehearing the Ohio Court was asked to clarify its decision, since it had 1) failed to address the constitutional issue in its initial decision in *Consumers' Counsel*, 2) failed to address the constitutional issue in denying CEI's Motion for Rehearing with a form Entry on September 1, 1981, 3) failed to address the constitutional issue in denying CEI's Motion to Stay, and 4) failed to address it a fourth time in dismissing CEI's present appeal from the COI order reducing its rates.

The Ohio Court rejected (for the fifth time) CEI's plea for some indication of its reasoning and denied CEI's Motion for Rehearing in this matter with a standard form Entry dated July 29, 1982.

CEI has raised the constitutional issue at least five times to the Ohio Court and has been unable to persuade that Court to address the issue at all.

REASONS REQUIRING PLENARY CONSIDERATION

I. OHIO REVISED CODE § 4905.22 AND § 4909.15(A)(4), AS CONSTRUED BY THE OHIO COURT, DIRECTLY CONFLICT WITH THE PROSCRIPTION OF THE FIFTH AND FOURTEENTH AMEND-

MENTS TO THE CONSTITUTION OF THE UNITED STATES PROHIBITING CONFISCATION OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW.

Ohio Revised Code § 4905.22 and § 4909.15(A)(4) may not constitutionally require a public utility to invest its capital in the present to provide adequate service to the public in the future and simultaneously deny recovery of that invested capital where it is found that the capital was prudently and reasonably invested for the convenience of the public for planning, engineering, and initial construction of electric generating units pursuant to the statutory requirement.

Ohio Revised Code § 4905.22, states, in pertinent part, as follows:

> "Every public utility *shall furnish* necessary and *adequate* service and *facilities*, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities as are adequate and in all respects just and reasonable." (emphasis added).

There is no question that this statute requires Appellant, as a public utility, to invest its capital in the present for planning and engineering for the convenience of the public to furnish adequate facilities in the future. The plain words of the statute say so, and the Ohio Court so held in *Consumers' Counsel*. The Ohio Court reiterated its stated view that "utilities *must anticipate* load growth years in advance to maintain adequate capacity to *ensure* reliable service . . ." (67 Ohio St.2d at 158, emphasis added).[13] An electric utility serving 700,000 customers obviously cannot operate without planning and engineering for the

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[13] *See also* Ohio Revised Code § 4905.20, which prohibits abandonment of utility facilities without Commission approval.

future. Large base load generating units, which have the advantage of being energy efficient, simply cannot be built without a lead-time exceeding ten (10) years.[14] The Commission found that the expenses at issue were proper business expenses which were prudently incurred.

Likewise, there is no question in this case that the capital invested by CEI for planning and engineering these generating units was dedicated to the convenience of the public as required by this Ohio statute. The Commission noted that "What the company seeks is the recovery of costs incurred on behalf of its rate payers to assure that adequate service could be maintained." (Quoted by the Ohio Court, 67 Ohio St. 2d at 161).

There is also no question as to the holding of the Ohio Court in *Consumers' Counsel*. It assumed that CEI's expenditures were required by Ohio Revised Code § 4905.22. It assumed they were prudently incurred. *Nonetheless*, the Ohio Court held that the Ohio ratemaking formula prohibits "the return *of* capital invested in failed projects. . . ." (67 Ohio St. 2d at 167).

Similarly, there is no question in this case regarding the accounting procedures imposed upon CEI by Ohio law and relied upon by CEI when it dedicated its capital to these projects. In 1937 the Federal Energy Regulatory Commission (then the Federal Power Commission)

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[14]The common law has for decades clearly required public utilities to anticipate future growth in demand and to take reasonable measures to meet that demand. *See Lukrawka v. Spring Valley Water Co.*, 169 Cal 318, 146 Pac. 640, PUR 1915 B 331 (1915) (a public utility must "anticipate the natural growth of the municipality . . . and take reasonable measures . . . to meet the reasonable demands . . . by the growing community." (146 Pac. at 643)); *People ex rel. Woodhaven Gas. Co. v. Deeham*, 153 N.Y. 528, 47 N.E. 787 (1897) ("It is well known that [utilities] are based upon calculations of future growth and expansion." (47 N.E. at page 788)); *Industrial Gas Co. v. Pub. Util. Comm.*, 135 Ohio St. 408, 21 N.E.2d 166 (1939).

adopted a Uniform System of Accounts, and required utilities subject to its jurisdiction, including CEI, to use it. *See* 18 C.F.R. 101 (1937). The Commission, pursuant to its authority under Ohio Revised Code § 4905.13, also adopted it, effective January 1, 1961, and required Ohio utilities, including CEI, to use it. *See* Ohio Administrative Code § 4901:1-9-05.

For the entire period from 1973 to 1979 during which CEI was spending this money, CEI was required by law to account for this money in certain ways, which it did. This Uniform System of Accounts defined "cost" to mean "the amount of money paid for property or services," (Definitions, ¶ 8), and described in detail the accounting procedures required for overhead construction costs like those involved here. (*See* Electric Plant Instructions, ¶ 4). Indeed, this Uniform System of Accounts sets out in great detail, under a separate heading, instructions to be used to account for "operating expenses" (*See* Operating Expense Instructions, at 18 CFR 101, pp. 309-310), prescribing some 400 separate Operation and Maintenance Expense Accounts (*See* 18 CFR 101, at pp. 366-392, Account Nos. 500-932).

The Uniform System of Accounts was and is the law in Ohio regarding utility accounting procedures. Under it, Overhead Construction Costs such as those involved here could *not* be shown on CEI's books as current operating expenses when made, although they were obviously necessary for the future operation of CEI. Instead, CEI had no choice but to capitalize the investment to Account 107, Construction Work In Progress, for the particular unit under construction, *See* 18 CFR Electric Plant Instructions, ¶ 4, Overhead Construction Costs, p. 300, and to defer any recovery *of* or *on* these expenditures until the units were recognized in rate base as part of Account 101, Plant in Service. From 1973 until January 22, 1980, CEI followed the Uniform System of Accounts and received no recovery

of its expenses in planning and engineering these units. But for the accounting procedures imposed by the Ohio Administrative Code, these expenditures could have been included in test year cost of service and recognized in rates in Appellant's two rate cases between 1973 and 1978. (PUCO Case Nos. 74-571-Y and 78-677-EL AIR).

If the units had been completed and had entered rate base, the dedicated capital investment (including the planning and engineering expenses here under discussion) would then have been recovered, over the property's life, through depreciation accruals. Ohio Revised Code § 4905.18 guarantees to the investor in utility property the recovery of *at least* the original cost of the investment by depreciation accruals. The investor is also allowed an opportunity to earn a return *on* such capital investment after it goes into service, since it becomes part of the utility's rate base. *See* Ohio Revised Code § 4909.15(A)(3); Uniform System of Accounts, 18 CFR 101, Definitions, ¶ 11, at p. 289, and Account No. 403, Depreciation Expense, at p. 314. Stated another way, the investor is not only entitled to get his original money back, but also to have an opportunity to earn a "profit" on his unrecovered investment. *Bluefield Water Works v. Pub. Serv. Comm.*, 262 U.S. 679, 690 (1923).

When CEI prudently and reasonably determined that the four planned generating units should be cancelled, the same Uniform System of Accounts provided for recovery of prudent expenditures through rates as part of Account 182, Extraordinary Property Losses, with the approval of FERC, which was obtained. Since the projects were not completed, the investment could not be allowed in rate base as part of Account 101, Plant in Service. Since the units had never been included in rate base, no depreciation accruals had been recovered through rates. *See Washington Gas Light Co. v. Baker*, 188 F.2d 11 (D.C. Cir. 1950) *cert. den.* 340 U.S. 952 (1951).

The invested dollars, none of which had been recovered in current 'cost of service' in prior rate cases, were required to be moved to Account 182, Extraordinary Property Losses, when the units were, prudently cancelled:

> "A. When authorized or directed by the Commission, this account *shall include extraordinary losses on property abandoned* or otherwise retired from service *which are not provided for by* the accumulated provisions for *depreciation* or amortization and which could not reasonably have been foreseen and provided for, and extraordinary losses, such as unforeseen damages to property, which could not reasonably have been anticipated and which are not covered by insurance or other provisions." (18 CFR 101, at p. 324, Account 182, Extraordinary property losses, emphasis added).

This provision was included in the Uniform System of Accounts when it was originally adopted by the FPC in 1973. *See* 18 CFR 101 (January 1, 1937, at page 103, then Account No. 101.141). This provision was part of the Uniform System of Accounts in 1961 when it was adopted by the Public Utilities Commission of Ohio (18 CFR 101, June 7, 1960, at page 5018) into the Ohio Administrative Code and has remained unchanged to this day. (18 CFR 101, Acct. 182, April 1, 1982, at p. 377).

Indeed, Account 182, "Extraordinary property losses" has been a part of Ohio law for so long, and is so obviously applicable to the circumstances presented here, that the Ohio Court even went so far as to distinguish the Ohio "statutes" in question from the Ohio Administrative Code containing Account 182, "Extraordinary property losses":

> "The *statutes* in question contain no provisions insulating investors from the type of *losses* sustained in the cancelled plants venture." (67 Ohio St.2d at 167, emphasis added.)

In other words, the Ohio Court did not disturb the Commission's finding that CEI's "extraordinary loss" should be accounted for pursuant to Account 182, but merely held that the *statutes* (Ohio Revised Code Sections 4905.22 and 4909.15(A)(4)), as distinguished from the Ohio Administrative Code, did not contain the "extraordinary loss" wording. However, the Ohio statutes do not define "cost," as does the Uniform System of Accounts. Further, the Ohio Administrative Code, containing Account 182, was and is just as binding on CEI as the statutes, and CEI was entitled to rely on its continued applicability when it deferred recovery of its investments from 1973 through 1979 in these generating plants.

The Ohio Court had previously relied upon the accounting rules contained in this very same Uniform System of Accounts in sustaining administrative orders of the Commission. *See Consumers' Counsel v. Pub. Util. Comm. (C&SOE),* 58 Ohio St.2d 108, at 112, 388 N.E.2d 1370 (1979). Indeed, the Ohio Court has previously relied upon these principles of accounting to sustain the Commission's administrative construction of the "cost of service" language in Ohio Revised Code § 4909.15(A)(4), at issue here, to allow the "amortization of deferred scrubber costs" as part of test year expenses under Section 4909.15(A)(4). *See Consumers' Counsel v. Pub. Util. Comm. (C&SOE), supra,* at 116. Further, the Ohio Court had expressly described a utility's "accounting treatment" under the Uniform System of Accounts as "highly probative" of the proper ratemaking treatment for the dedicated capital. *Consumers' Counsel v. Pub. Util. Comm. (Toledo Edison),* 58 Ohio St.2d, 449, 455-456, 391 N.E.2d 311 (1979).

Ohio Revised Code, Section 4909.15, states, in pertinent part, as follows:

> "(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, and charges shall determine:
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> • • •
>
> (4) The *cost* to the utility *of* rendering the public utility *service* for the test period . . . ." (emphasis added).

The Ohio Court held for the first time in *Consumers' Counsel,* contrary to the provisions of the Uniform System of Accounts, that the words "cost . . . of . . . service" in this statute prohibit the Commission from including in cost of service any cost other than "normal, recurring expenses incurred by utilities in the course of rendering service to the public for the test period." (67 Ohio St.2d at 164).

Thus, Ohio Revised Code § 4905.22 requires a public utility to dedicate its capital to the planning and engineering of future generating plants, the Uniform System of Accounts prohibits the current recovery of those expenditures, and Ohio Revised Code § 4909.15(A)(4), as construed in *Consumers' Counsel,* prohibits the Commission from providing for recovery *of* those same expenditures[15] as costs of service in rates. Appellant submits that is a confiscation of its property without due process of law in violation of the Fifth and Fourteenth Amendments.

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[15]CEI did not propose, and the Commission did not allow, earnings *on* this investment. There is no return or, in layman's terms, "profit", involved at all in this case. In many other cases, commissions have allowed considerably *more* relief to the utility by allowing rate base treatment of the unamortized portion of the cancellation costs. *See Rochester Gas & Elec. Co.,* Case No. 27794, New York Pub. Serv. Comm. Opinion No. 82-1 (January 12, 1982); *Wisconsin Elec. Pwr. Co.,* 40 PUR 4th 630, 688 (1981); *Carolina Power & Light Co.,* No. E-2, Sub 391, North Carolina Pub. Util. Comm. (May 9, 1980).

This Court decades ago held that rates fixed so low as not to cover the "reasonable *cost* of maintaining the road" were confiscatory. *Covington and Lexington Turnpike Road Co. v. Sanford,* 164 U.S. 578, 595 (1896). Likewise, Justice Brandeis, in his classic dissent in *Missouri ex. rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm.,* 262 U.S. 276 (1923) said that:

> "the compensation which the Constitution guarantees an opportunity to earn is the reasonable *cost* of conducting the business. Cost includes *not only operating expenses, but also capital charges.* Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital . . . . But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the *cost of service* as thus defined." (262 U.S. at 291, emphasis added).

Justice Brandeis advocated "adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return . . . ." 262 U.S. at 306.

In *Bluefield Water Works Co. v. Public Service Commission of West Virginia,* 262 U.S. 679 (1923), this Court addressed the requirements of the United States Constitution regarding the required rate of return on investment by a utility:

> "A public utility is entitled to such rates as will permit it to earn a return *on* the value of the property which it employs for the convenience of the public equal to that generally being made at the same time, and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." (262 U.S. at 692-693, emphasis added).

The following year in *Pacific Gas & Electric Co. v. City and County of San Francisco*, 265 U.S. 403 (1924), this Court held that it was unconstitutional confiscation for the District Court to employ in cost of service the reduced costs to manufacture gas made possible by new inventions but to exclude from the valuation of the rate base both 1) the proper valuation for the patented inventions and 2) "recompense for the obsolence" of the utility property which had to be abandoned. (265 U.S. at 415).[16]

The importance of *Pacific Gas* here is that this Court placed particular emphasis on the facts that 1) the patents which rendered the old gas plant obsolete "were of recent conception," 2) the utility could not have provided for the obsolescence of the old plant through depreciation charges in previous rates, and 3) the obsolescence "could not have been long anticipated." The same is true of CEI's investment in these plants.

The denial of at least recovery *of* those costs by Ohio Revised Code § 4909.15(A)(4) as construed and applied to CEI here amounts to the same kind of confiscation as was found unconstitutional in *Pacific Gas, supra.*

Just as the West Virginia Commission in *Bluefield* was not permitted, consistently with the U.S. Constitution, to utilize an artificially low *valuation* of the utility's *rate base* property in arriving at the amount of a fair and reasonable return, so the State of Ohio in this case cannot, by statutory mandate or otherwise, utilize an artificially low determination of CEI's *cost of service* in setting the net return allowable to CEI, if such return,

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[16]Obviously, we do not face precisely the same rate base issue here, since CAPCO's four planned generating units never became part of the rate base. Conversely, in the present case we need not face any issue as to whether depreciation accruals on the "abandoned plant" were sufficient to cover the risk of abandonment, since the expenses involved here were never subject to depreciation accruals.

net of the actual costs incurred by CEI, would not be fair and reasonable under *Bluefield* and like decisions of the Supreme Court of the United States.

This proposition must be obvious. As the Circuit Court of Appeals for the District of Columbia said in reviewing a Federal Power Commission rate order on the issue of the allocation of expenses between jurisdictions:

> "Expenses (using that term in its broad sense to include not only operating expenses but depreciation and taxes) are facts. They are to be ascertained, not created, by the regulatory authorities. *If properly incurred, they must be allowed* as part of the composition of the rates. *Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce.*"

Mississippi River Fuel Corp. v. Fed. Pwr. Comm., 163 F.2d 433, at 437 (1947) (emphasis added).

In light of the Ohio Court's announcement of "new law" in its construction of the words "cost . . . of . . . service" in Ohio Revised Code § 4909.15(A)(4), which the Commission was compelled to follow, CEI respectfully submits that Ohio Revised Code § 4909.15(A)(4), as so construed, and as applied in this case, requires the imposition of unconstitutional rates that, in the words of *Bluefield*, "are confiscatory and therefore beyond legislative power." 262 U.S. at 690.

II. OHIO REVISED CODE § 4905.22 AND § 4909.15 (A)(4), AS CONSTRUED BELOW, DIRECTLY CONFLICT WITH THIS COURT'S DECISION IN *FEDERAL POWER COMMISSION V. HOPE NATURAL GAS CO.*, 320 U.S. 591 (1944).

Ohio Revised Code § 4909.15(A)(4) and § 4905.22, as construed, unconstitutionally exclude prudent planning expenses incurred for the convenience of the public from a utility's allowable cost of service for ratemaking pur-

poses, where the risk of such exclusion was not considered in setting the fair rate of return, thereby unconstitutionally reducing the utility's effective overall net rate of return below the level expressly found to be fair, just, and reasonable.

In *Hope, supra,* this Court upheld the use of an original cost/prudent investment "rate base" as constitutional, emphasizing that the overall objective in ratemaking is not the method employed, but the maintenance of the integrity of the utility's investment. This Court emphasized that basing depreciation expense on original cost assured that ". . . the utility is *made whole* and the integrity of its investment is maintained." (302 U.S. at 606). Thus, the test applied by this Court in evaluating whether the 'result reached' was constitutional was twofold: 1) whether the utility was "made whole," in terms of net investment, and 2) whether the "integrity of its investment" was maintained.[17]

This Court also recognized that the "financial integrity of the company" required "enough revenue not only for *operating expenses* but also for the capital costs of the business. These include service on the debt and dividends on the stock." (320 U.S. at 603). This Court summarized the elements required to meet the just and reasonable test of the Natural Gas Act and to avoid confiscation:

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[17]Ohio Revised Code § 4905.18 guarantees to the investor, through depreciation expense, that he will at least be "made whole" for his capital investment in property which enters rate base. Plainly the Ohio Legislature recognized its constitutional obligation to maintain the integrity of the utility's investment and to make the utility whole where the investment enters rate base and is depreciated. The Commission's initial order allowing amortization in this case, and Account 182 of the Uniform System of Accounts, simply accomplished the same constitutional result where the investment did not become part of the statutory rate base.

> "Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and *to compensate its investors for the risks assumed* certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called "fair value" rate base." (320 U.S. at 605, emphasis added).

The criteria announced in *Hope* are the criteria for measuring confiscation in violation of the Fifth Amendment. *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968). The confiscation clause of the Fifth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Bechwith*, 449 U.S. 155, 160 (1980), citing *Chicago, B & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122 (1978).

Applying these criteria to this case shows clearly that Ohio Revised Code § 4909.15(A)(4), as construed by the Ohio Court and applied by the Commission, confiscates CEI's property. CEI's capital was expended for the convenience of the public pursuant to CEI's statutory obligation to plan and engineer its utility system to serve adequately in the future. CEI's shareholders had not been compensated through depreciation accrual rates nor through rate of return in prior cases for the risk that these planning expenses would be totally excluded from cost of service for ratemaking purposes.

The Court of Appeals for the District of Columbia has had occasion to address a closely analogous situation. In *Washington Gas Light Co., et al. v. Baker*, 188 F.2d 11 (D.C. Cir. 1950), *cert. den.* 340 U.S. 952 (1951), that Court affirmed the District Court's reversal of a Utilities Commission rate order which included the depreciated original cost of the utility's abandoned West Plant *in rate base* in determining the rates. By including the aban-

doned gas plant in rate base, the Commission in *Washington Gas Light* had awarded a return *on* the investment in the abandoned plant. (The issue on this appeal, the recovery *of* the investment in the abandoned gas plant, was not even debated.) The Circuit Court found that the record before the Commission was inadequate for it to determinate whether the investor had *already* received a return *on* the investment for the risk of obsolescence through either 1) depreciation expense in cost of service or 2) "as a risk considered in fixing the permissible rate of return." (188 F.2d at 20). Accordingly, the decision of the Commission was vacated and remanded because it potentially had allowed the investor a return *on* his investment twice. The Circuit Court commented that it seemed "likely . . . in view of the prevalence in the past of the doctrine that abandoned property would not be included in the rate base . . . that investors have been compensated for the risk of obsolescence." (188 F.2d at 20).

In the present case, the investors were *not* compensated through depreciation expense, since there were no depreciation expenses. The four units never got beyond the planning and engineering stage and, therefore, were never accorded a depreciation expense allowance.

Second, CEI's investors were *not* compensated, in fixing the permissible rate of return, for the risk that these planning, engineering, and initial construction costs would be entirely excluded from cost of service.[18] The

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[18] *Washington Gas Light* involved the question of recovery *on* rate base, which was not requested or granted to CEI here. Appellant only requested recovery *of* expenditures in cost of service. It is noteworthy that the Circuit Court *Washington Gas Light* affirmed the Commission's allowance of a recovery *of* rate base investment, by a ten year amortization in cost of service, of 'extraordinary" expenditures for converting customer's appliances from manufactured to natural gas. The "extraordinary" conversion expenditures are obviously closely analogous to the planning expenditures in this case.

reason is precisely the opposite of the facts mentioned by the Circuit Court in *Washington Gas Light*. In *Consumers' Counsel*, the Ohio Court admitted that "the overwhelming weight of authority from other jurisdictions supports the position of the [Ohio] commission" allowing recovery of such planning costs.[19] (67 Ohio St.2d at 162). Since "the overwhelming weight of authority from other jurisdictions" allowed recovery of similar expenses, the investor did *not* anticipate the risk of exclusion from cost of service in Ohio and therefore did *not* cause the market to reflect that risk in a higher required rate of return. The evidence so showed and the Ohio Court's holding that *Consumers' Counsel* announced "new law" confirms that this risk was not anticipated by the investor and was not included in the rate of return allowed in prior rate cases.

In PUCO Case No. 79-537-EL-AIR and PUCO Case No. 80-376-EL-AIR, the fair rate of return allowed *assumed* inclusion in cost of service of these expenses for ratemaking purposes. The Commission initially included these expenses in the allowable cost of service and established both the rate of return and the amount of the total rate increase on that basis. That is, the return allowed was allowed *over and above* recovery of these expenses. In the case on appeal, the Commission simply deducted these expenses from the rates previously allowed, without any

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[19]Copies of unreported decisions and citations to reported decisions from FERC and 22 states were provided to the Ohio Court and were not challenged by the Ohio Court or any party. The citations are included in the Table of Authorities to this Jurisdictional Statement. Although 23 jurisdictions have allowed amortization very recently, there is nothing new about the legal principle. Cases from 16 states dating back to 1929 were cited to the Ohio Court and are also listed in the Table of Authorities.

consideration of CEI's return requirement in *that*[21] situation. Thus, as construed by the Ohio Court, Ohio Revised Code § 4909.15(A)(4) prohibits the Commission from setting rates which "compensate [Appellant's] investors for the risks assumed. . . ." *Hope, supra,* at 605.

The inevitable effect of construing Ohio Revised Code § 4909.15(A)(4) to preclude CEI from recovering such prudent planning expenditures as part of its cost of service is to reduce CEI's effective overall net rate of return on its property employed for the convenience of the public below a level which is fair, just, and reasonable under the *Bluefield* and *Hope* standard. As construed by the Ohio Court in *Consumers' Counsel,* Ohio Revised Code § 4909.15(A)(4) required the Commission to exclude prudent planning expenditures incurred by a utility even though such expenditures would clearly be regarded as legitimate costs of business if incurred by a nonregulated business concern and would be recovered in the price of its product or service. As a consequence, what might otherwise be a fair and reasonable net return, where such planning costs are included, becomes unconstitutionally unfair and unreasonable when the utility has incurred such prudent expenditures, which, as in this case, may be quite large in magnitude, but is not permitted to include such costs before determining the net return on its investment.

Since the investor was not compensated either through depreciation expense or through rate of return, the reasoning of *Washington Gas Light* clearly demonstrates that Ohio Revised Code § 4909.15(A)(4), as construed, simply

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[21]The Commission has subsequently concluded, in CEI's 1981 Case, that the Ohio Court's decision caused an increase in the cost of capital to CEI and, hence, required an increase in the allowed return. *This fact was ignored in the COI case, here on appeal.*

confiscates the capital which CEI was required by law to dedicate to the present and future convenience of the ratepayers.

CONCLUSION

In its decision in *Consumers' Counsel*, the Ohio Court construed Ohio Revised Code § 4909.15(A)(4) to require the Commission to remove from cost of service the accumulated costs of planning the four cancelled units. The Commission has now removed from cost of service these prudent expenses even though, as it found, it had not in past rates compensated the investor by recognizing a higher overall rate of return as reasonable in light of such a new and unforeseen degree of risk. We are confronted with no evidentiary or technical rate making issues. The facts are not in dispute.

The Commission in Case No. 80-376-EL-AIR allowed amortization of the planning costs as an allowable expense for ratemaking purposes and *then* found a fair and reasonable overall rate of return to be 11.76 percent. The Ohio Court then held in *Consumers' Counsel* that Ohio Revised Code § 4909.15(A)(4) prohibits "the return of capital invested" for such planning and engineering as an allowable expense. The Commission, in its COI order, has now reduced CEI's rates by removing the amount attributable to the cancelled facilities *without considering or revising CEI's revenues, expenses, or rate of return.* As a consequence, the rates have been established based on a cost of service which is artificially low, and the resulting rates inevitably yield an overall rate of return which *must* be below that which has been *found* to be fair, just and reasonable. Such rates, Appellant submits, are confiscatory in violation of the United States Constitution.

For the foregoing reasons, this Court should reverse the decisions of the Ohio Court and allow amortization of Appellant's prudent planning and engineering expenses in its cost of service.

Respectfully submitted,

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EXHIBIT I

OHIO ELECTRIC RATE CASES
OF
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

79-537-EL-AIR	80-376-EL-AIR	81-1096-EL-COI	81-146-EL-AIR
Case Noticed 6/19/79			
PUCO Hearings 4/2/80-5/22/80	Case Noticed 4/2/80		
PUCO *Opinion and Order* 7/10/80			
Rates Take Effect 7/14/80			
PUCO Rehearing Order 9/3/80			
Ohio S.Ct. Appeal Filed 10/22/80			
			Case Noticed 1/30/81
	PUCO Hearings 3/6/81-4/2/81		
Ohio S.Ct. Oral Argument 3/26/81	PUCO *Opinion and Order* 5/4/81		
	Rates Take Effect 5/6/81		
	PUCO Rehearing Order 6/24/81		
Ohio S.Ct. Decision 7/15/81			
	Ohio S.Ct. Appeal Filed 8/21/81*		
Ohio S.Ct. Rehearing Order 9/1/81**			

*Cancelled plants issue not appealed by any party.

**Dismissed with standard form Journal Entry without opinion.

EXHIBIT I (continued)

OHIO ELECTRIC RATE CASES
OF
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

79-537-EL-AIR	80-376-EL-AIR	81-1096-EL-COI	81-146-EL-AIR
U.S. S.Ct. Appeal Filed 9/2/81			
Ohio S.Ct. Motion For Stay Denied** 9/11/82		Case Noticed 9/16/81	
		PUCO Oral Argument 10/13/81	
		PUCO *Opinion and Order* 10/21/81	
		Rates Take Effect 10/28/81	
	Ohio S.Ct. Argument 12/1/81		
		PUCO Rehearing Order 12/9/81	
			PUCO Hearings 12/17/81-2/1/82
		Ohio S.Ct. Appeal Filed 1/27/82	
U.S. S.Ct. Decision 2/25/82	Ohio S.Ct. Decision 3/3/82		
			PUCO *Opinion and Order* 3/17/82
			Rates Take Effect 3/19/82
			PUCO Rehearing Order 5/12/82
		Ohio S.Ct. Oral Argument (None)	
		Ohio S.Ct. Decision 7/7/82**	
			Ohio S.Ct. Appeal Filed 7/12/82
		Ohio S.Ct. Rehearing Order 7/29/82**	
		U.S. S.Ct. Appeal Filed 10/15/82	

*Cancelled plants issue not appealed by any party.

**Dismissed with standard form Journal Entry without opinion.